

JAN 28 1924

**In the Supreme Court of the United States**

**October Term, 1923**

**WESTERN UNION TELEGRAPH  
COMPANY,**

**Petitioner,**

**vs.**

**STATE OF GEORGIA,**

**As Owner of Western & Atlantic  
Railroad,**

**and**

**NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY,**

**As Lessee operating said Railroad under  
the corporate name and style of**

**WESTERN & ATLANTIC  
RAILROAD,**

**Respondents.**

**PETITION FOR WRIT OF CERTIORARI  
AND  
BRIEF**

**FRANCIS R. STARK,**  
New York, N. Y.

**ARTHUR HEYMAN,**  
Atlanta, Georgia.

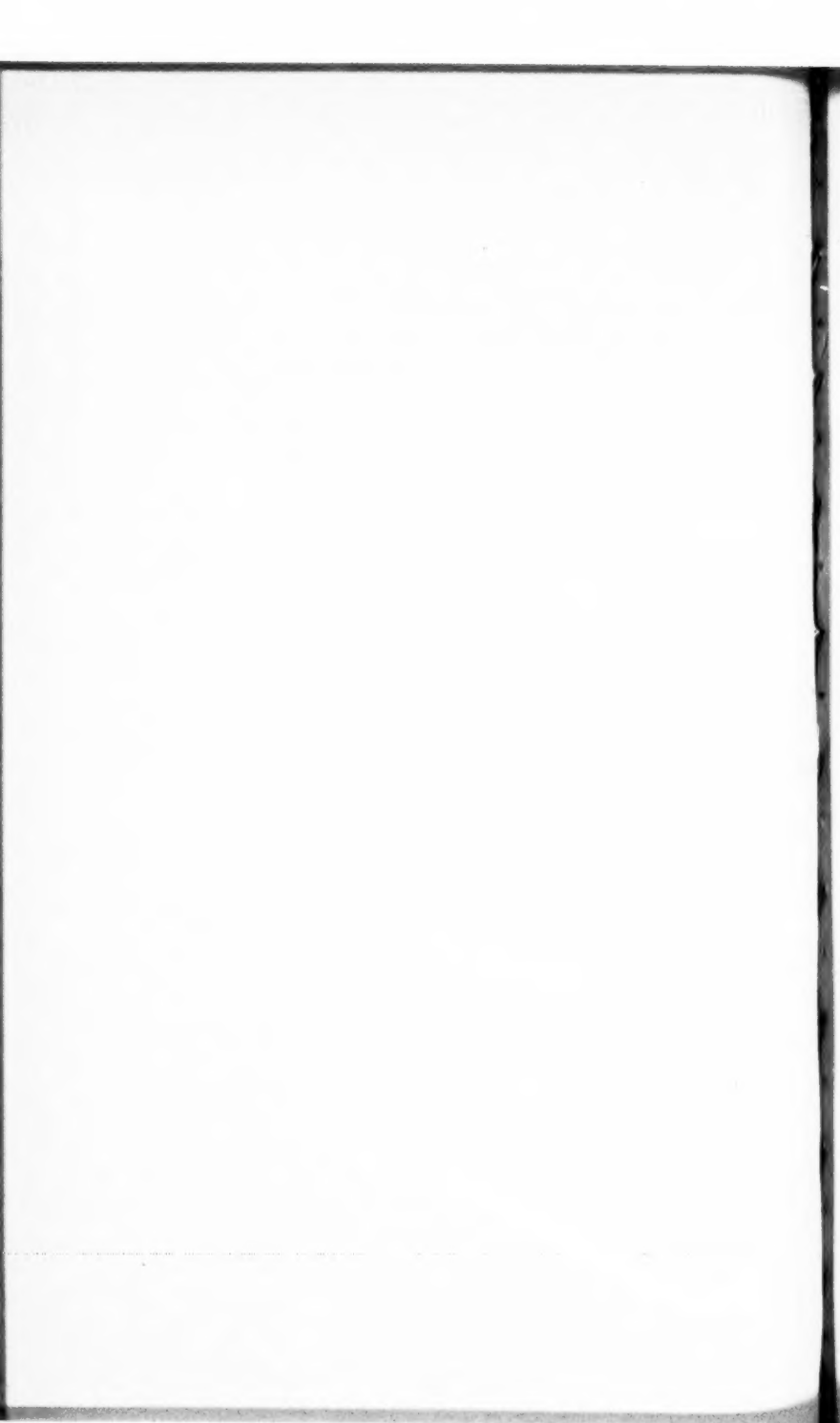
**WILLIAM L. CLAY,**  
Savannah, Georgia.

*Solicitors for Petitioner.*

Office Supreme Court, U. S.  
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**No. 70,24**

**24**



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IN THE SUPREME COURT OF THE 1  
UNITED STATES

WESTERN UNION TELEGRAPH  
COMPANY,

Petitioner,

*versus*

STATE OF GEORGIA, as Owner of  
Western & Atlantic Railroad,  
and NASHVILLE, CHATTANOOGA  
& ST. LOUIS RAILWAY, as  
Lessees operating said Rail-  
road under the corporate name  
and style of WESTERN &  
ATLANTIC RAILROAD,

Respondents.

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*To The Honorable, The Supreme Court of the  
United States:*

The petition of the Western Union Telegraph  
Company, herein sometimes styled Western Union,  
respectfully shows:

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**GENERAL STATEMENT OF THE CASE.**

This suit was brought in the superior court of  
Fulton County, Ga., to remove the petitioner from  
the right of way of the respondents. Petitioner  
appealed to the supreme court of Georgia from  
the decree of the superior court in favor of the re-  
spondents. The decree of the superior court was

affirmed by a divided court, three of the judges voting for affirmance and three for reversal. Under the Georgia law this automatically affirmed the court below. An application for a rehearing was denied by the same vote. **The chief justice of the supreme court of Georgia has allowed a writ of error, and the cause upon said writ is now docketed in this court.**

The telegraph lines of the petitioner involved in this case were built upwards of sixty years ago, under various grants from the State of Georgia, and under certain contracts with that State, and with corporations and individuals, and more recently under authority of the Post Roads Acts of Congress; and these lines have been continuously in operation since they were constructed. The Western & Atlantic Railroad, upon or along whose right of way from Atlanta, Ga., to Chattanooga, Tenn. the telegraph lines stand, is owned by the State of Georgia, which for a long period itself operated the road, but afterwards leased it to the Nashville, Chattanooga and St. Louis Railway, a corporation of Tennessee, which is now operating the road as lessee.

In 1915 the Georgia Legislature passed an Act (amended in 1916) creating the Western & Atlantic Railroad Commission, purporting to give that commission power to remove encroachments upon the railroad right of way, and it is under the supposed authority of that Act that this suit is brought.

The petitioner, among other things, contends:

A. That the Georgia Act of 1915, and the amendment thereto, and the action of the State of Georgia through the commission created thereby, and the present lease by the State of Georgia to the Nash-

ville, Chattanooga & St. Louis Railway, impair the contracts between the petitioner, and its predecessors, and the State of Georgia and others in violation of the Constitution of the United States.

B. That said Act, and the amendment thereto, and the action taken thereunder by the State of Georgia through the said Commission, and said lease, deprive the petitioner of property without due process of law, contrary to the Constitution of the United States.

C. That the final decree of the supreme court of Georgia gives to said Act of Georgia, as amended, such force and effect that the various contracts between the State of Georgia and others, and the petitioner, are thereby impaired in violation of the Constitution of the United States. 8

D. That the final decision of the supreme court of Georgia has changed a rule of law or construction of statutes theretofore laid down by the highest court of Georgia, applicable to the contracts theretofore made between the petitioner and the State of Georgia and others, thereby impairing the obligations of said contracts and depriving the petitioner of its property without due process of law, all in violation of the Constitution of the United States. 9

E. That said Act of Georgia of 1915, as amended, and as interpreted by the final decision of the Georgia supreme court, is unconstitutional in that it deprives the petitioner of property outside of the State of Georgia, namely: of its telegraph lines within the State of Tennessee, without due process of law, and in that it fails to give full faith and credit to statutes and decisions of the courts of

Tennessee with respect to the part of the telegraph line within that State.

- 11 The effect of the decree of the highest court of the State, if unreversed, will be to compel the removal of this important trunk line of telegraph, which has been continuously used for more than sixty years in interstate and foreign commerce, and in the transaction of telegraph business for the Government of the United States. The question is therefore one not only affecting the immediate parties, but involving considerations of very considerable public interest. **This writ of certiorari is applied for because of the possible doubt whether, under the Judicial Code, all the Federal questions which exist in the case can be properly presented in this court on the writ of error.**

Georgia and its lessee in their petition claim:

- 12 The State of Georgia in its sovereign and governmental capacity is the owner of the Western & Atlantic Railroad, which was operated by her legislative and executive departments until December 27, 1870. Since that date that railroad has been leased to, and has been operated by, private corporations. The present lease was made December 27, 1919, to the Nashville, Chattanooga & St. Louis Railway.

Telegraph lines of the Western Union Telegraph Company are situate upon the right of way of the Western & Atlantic Railroad unlawfully, without right, and in derogation of the State's right and title. This operates adversely to the rights and interest of the present lessee.

The Georgia Statute of November 30, 1915 (as amended) created the W. & A. R. R. Commission which was given full power and authority to deal with and dispose of all encroachments upon the

right of way of the Western & Atlantic Railroad; to cause the removal and discontinuance thereof; and to institute legal proceedings.

The Western & Atlantic Railroad Commission by resolution found petitioner's telegraph lines to be an unlawful encroachment upon said right of way, and directed the institution of this suit for their removal.

The Western Union Telegraph Company in its answer and plea claims:

The State of Georgia does not own and operate said railroad in its governmental or sovereign capacity either in Georgia or in the State of Tennessee. In embarking in that enterprise and in owning and operating that railroad, Georgia waived her sovereign character in respect thereto, and subjected herself at all times to the laws and regulations applicable to, and binding upon, a private person or private corporation, or ordinary railroad corporation owning, maintaining and operating a railroad, and assumed all of the liabilities and burdens imposed upon a private person or corporation incident to such ownership and business. Title could be acquired to such railroad properties by adverse possession, and by such action or nonaction on the part of Georgia, as would give title against a private person owning a railroad; and Georgia would be barred and estopped from disputing the claims and title of persons or corporations to portions of the right of way and properties of said railroad under circumstances under which a private person or corporation would be barred and estopped. The answer plead decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee to this effect.

The State of Georgia owned "right of way" for

its railroad; but that right of way was an easement for railroad purposes only—the ownership of the soil and every other use remaining and being in the original land-owner and his assigns.

- Grants of perpetual easements for the lines of telegraph of the Western Union Telegraph Company along the Western & Atlantic Railroad from the State of Georgia to its predecessors in title, and directly to itself, were plead. These grants are specified below in Reasons for Allowance of the Writ of Certiorari, and are, therefore, not more  
17 fully designated here.

The Georgia Statute of March 6, 1856, still in force, declares the State of Georgia will be barred by laches whenever an individual will be barred. Facts which would bar an individual, and the action of the Legislature of Georgia requiring persons having adverse claims to right of way of that railroad to be treated in an equitable manner, were plead.

The Statute of Limitations of Tennessee and such possession as would create good title thereunder was also plead.

- The Post Roads Act of the United States to aid  
18 in the construction of telegraph lines, and to secure to the government certain benefits therefrom, was plead.

The affirmative grant and obligations of that statute, coupled with the grant of perpetual easements by the State of Georgia, makes it unlawful for the State of Georgia, its lessee, or the Western Union Telegraph Company, to destroy or abandon these telegraph lines, or defeat the service which that statute requires to be rendered to the United States, which has the right to purchase those lines when it desires as provided in the Post Roads Act.



Title by adverse possession both in Tennessee and in Georgia and such possession as would create good title thereunder were plead.

The Georgia Act of November 30, 1915, Georgia's lease to the N. C. & St. L. Ry., and the action of the W. & A. R. R. Commission, are unconstitutional. If given the force and effect claimed, which the decree in this cause has given them, they violate the Constitution of the United States by impairing the obligations of contracts, and in taking property without due process of law. This violates the United States Constitution, Article 1, Section 10, Paragraph I, and the 14th amendment to that Constitution, and the Western Union Telegraph Company, without due process of law, will be deprived of property, title and rights which had vested in it under the laws of Georgia and of the United States. This defense was expressly plead in paragraphs VI and VIII of the original answer and in the plea set forth in paragraph XXV of the amendment. 20

On motion of Georgia and her lessees, all of the claims and defenses of the Western Union Telegraph Company above stated and plead were stricken. 21

The plea of the Western Union Telegraph Company affirmatively setting up its own title through grants from Georgia to its predecessors in title and deraigned into itself, and the grant from Georgia directly to itself, was stricken in its entirety.

Georgia and her lessee were not required to prove title or to introduce any deeds or muniments of title, notwithstanding testimony of their witnesses that there were such deeds conveying right of way.

The decree adjudges that the easements now

*General Statement of the Case*

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used and enjoyed by the Western Union Telegraph Company are covered by the present lease from the State of Georgia to the N. C. & St. L. Ry.; and that by that lease Georgia has obligated itself to oust the Western Union Telegraph Company and to deliver these easements into the possession of the N. C. & St. L. Ry.

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The finding of the Western & Atlantic Railroad Commission that the Western Union Telegraph Company occupies the right of way of the Western & Atlantic Railroad without right and unlawfully was an ex-parte proceeding, no notice of which was given to the Western Union Telegraph Company.

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The Act creating that Commission made no provision for the giving of notice to, or of the service of any process upon, the Western Union Telegraph Company. It did not create any machinery under which that Company would be afforded an opportunity to appear before that Commission to assert and defend its claims and rights. In these respects the said statute, and the action of the Commission, violate the Constitution of the United States. The decree in this cause enforcing such findings, will, if not reversed, enforce the taking of, and cause to be taken, property of the Western Union Telegraph Company without due process of law.

In the trial of this cause the State of Georgia and her lessee were relieved of the burden of proving their asserted claims; were not required to prove title to right of way; what that right of way was; or whether the easements of the Western Union Telegraph Company did or did not impair or interfere with the easement of the State of Georgia for railroad purposes in the same land. The presumption arising against an ordinary suitor upon

proof of title out of a plaintiff that the title remains out of plaintiff until he has <sup>ac-</sup>quired it was denied Western Union Telegraph Company.

Plead denials by Western Union Telegraph Company of the allegations of the State and her lessee in their petition were stricken on their motion.

Full force and effect was, contrary to the Constitution of the United States, denied the decisions of the Supreme Court of Tennessee adjudicating that, in owning and operating her railroad in Tennessee, Georgia did not act in a sovereign capacity, but only in the capacity of an ordinary railroad corporation or private person, subject to all the laws applicable thereto.

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Whether, in Georgia or in Tennessee, Georgia in the ownership and operation of its railroad did or did not act in a sovereign capacity, upon instituting this suit she became subject, as would an ordinary suitor, to the rules of law, processes, practices, the rules of the burden of proof, and to presumptions arising upon proof of certain facts, prevailing in the forum of her court whose processes and rules she invoked. From all of these she and her lessee were nevertheless relieved in the trial of this cause, and the decree therein resulted, not from a trial in which due process of law was accorded to, but in which due process of law was denied, the Western Union Telegraph Company, and particularly in the respects herein above and hereinafter stated.

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The Supreme Court of Georgia did not pass upon the validity of the grant made by the State of Georgia directly to the Western Union Telegraph Company by contract of August 18, 1870. The decision of the court turned almost exclusively on the validity of the grant of the State of Georgia to

the Augusta, Atlanta & Nashville Magnetic Telegraph Company of the easements now occupied by the Western Union Telegraph Company. The decision of the court turned upon the provision of the then Constitution of Georgia, to wit: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."

Justice Custer and two other Justices, citing prior unreversed decisions of the Supreme Court of Georgia by a full bench, held the Georgia Constitution was not violated; that the Act of 1852 granted perpetual easements to the Augusta, Atlanta & Nashville Magnetic Telegraph Company; that the Western Union Telegraph Company should be permitted to prove its title deraigned in its answer and plea, which constituted a good defense; and that "if in any case a grant should be presumed it should be presumed in favor of this defendant under the facts alleged and proved in this record."

These Justices further stated that the decision of the Supreme Court of Georgia cited by them and particularly Goldsmith vs. Rome Railroad Co. 62 Ga. 473, "covers and adjudicates in principle the question which we are called upon here to decide."

Chief Justice Russell and two associate Justices, without commenting upon the Georgia decisions cited by Justice Custer, and without citing any decision of that court, held that the Act of 1852 violated the Georgia Constitution. The Court being evenly divided the judgment of the trial court was affirmed by operation of law. The judgment of the Supreme Court of Georgia affirming the trial court by a divided court was rendered on September 13, 1923.

Endeavor to comply with the rule limiting this

*General Statement of the Case*

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petition to a summary and short statement of the matters involved may have resulted in too great a generalization of statement. For this reason, and to aid the court in an examination of the pleadings and record of this case, which are voluminous, petitioner prefaces its brief hereto attached with a more ample statement of the pleadings, certain evidence introduced or excluded and rulings of the court germane to the claims of violation of the Constitution, and the decisions of the Justices of the Supreme Court of Georgia.

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**Rehearing duly sought was denied by the  
Supreme Court of Georgia Sept. 29th, 1923**

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## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

The chief reasons assigned by the Western Union Telegraph Company, your petitioner, for the allowance of the writ of certiorari herein prayed are:

35      The Georgia Act of November 30, 1915, and the amendment thereto, plead in the petition and upon which the suit is based; the action of Georgia through its Western & Atlantic Railroad Commission; and Georgia's lease of the Western & Atlantic Railroad;

(a) Impair contracts previously made by the State of Georgia with the predecessors in title of the Western Union Telegraph Company, and made directly with the Western Union Telegraph Company, contrary to the Constitution of the United States;

36      (b) Take from the Western Union Telegraph Company rights and title to property, which under the laws of Georgia have become fully vested in the Western Union Telegraph Company, and deprive the Western Union Telegraph Company of property without due process of law contrary to the Constitution of the United States.

The foregoing more fully stated, and other reasons, are:

### I.

**Georgia Act of November 30th, 1915, lease of 1917, and action of Commission impair contracts.**

Georgia by the legislative act of November 30, 1915, with its amendment; by her lease of 1917;

and by the action of the Western & Atlantic Railroad Commission, has violated the Constitution of the United States in that thereby the obligations of the following contracts are impaired:

The contracts made by Georgia with the predecessors in title of the Western Union Telegraph Company, (1) with Garst & Bean A. D. 1850, (2) with Augusta, Atlanta & Nashville Magnetic Telegraph Company A. D. 1852, and (3) the contract made directly by Georgia with the Western Union Telegraph Company dated August 18, 1870.

By each of these contracts Georgia granted perpetual easements along the Western & Atlantic Railroad for the construction, maintenance and operation of the telegraph lines now owned by the Western Union Telegraph Company.

The final decree of the Supreme Court of Georgia gives to said Georgia Act of November 30, 1915, and its amendments, to her lease of 1917, and to the action of the W. & A. R. Commission, such force and effect that the above mentioned contracts are thereby impaired; and enforces that act and its amendments, that lease, and the resolution of the W. & A. R. R. Commission, by commanding the Western Union Telegraph Company to remove its said lines of telegraph from the right of way of the Western & Atlantic Railroad, and to surrender possession of, and to cease using, the perpetual easements which Georgia granted by the above named contracts.

Thereby the Constitution of the United States Art. 1, Sec. 10, Par. 1, is violated.

**II.****Change in rule of construction by State Court.**

41      The final decision of the Supreme Court of Georgia has changed a rule of law or construction of statutes by the highest court of Georgia applicable to the contract made with the predecessor in title of the Western Union Telegraph Company by the Georgia act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Under the rule of law or construction previously established by the Supreme Court of Georgia and applicable to that contract, or charter act, section 6 and section 9 of that act would each have been held to be valid, lawful and not violative of the Constitution of Georgia. The final judgment of the Supreme Court of Georgia in this cause changes that rule and adjudges section 6 and section 9 of that act, and each of those sections, to be invalid, unlawful and violative of the Constitution of Georgia.

42      Section 6 of that act ratified Georgia's contract of October 11, 1850, with Garst & Bean, which gave to the latter perpetual easements along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title of Garst & Bean.

Section 9 of that act granted perpetual easements to the Augusta, Atlanta & Nashville Magnetic Telegraph Company along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title to the



Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The effect of the final decision of the Supreme Court of Georgia in this cause, if not reversed by the Supreme Court of United States, will be to divest the Western Union Telegraph Company of the property, title and rights vested in it and in its predecessors in title under said contract and the law heretofore applicable thereto, which is contrary to the Constitution of the United States and particularly Art. 1, Sec. 10, Par. 1 thereof and the 14th amendment thereto.

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### III.

#### **Title, right, privilege or immunity claimed under the constitution or statutes of the United States denied.**

The decision of the Supreme Court of Georgia is against the title, right, privilege or immunity specially set up or claimed by the Western Union Telegraph Company under the Constitution of the United States and a statute thereof; Georgia has deprived the Western Union Telegraph Company of property without due process of law, and has denied to it the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States; and has denied to the Western Union Telegraph Company, and deprives it of, the title, right, privilege and immunity to which it is entitled by virtue of its acceptance of the Post Roads Act of Congress of July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, government and other purposes"; in that,

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46      *Reasons for Allowance of Writ of Certiorari*

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(a) The decree adjudges that the Georgia act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry. of the easements now used by the Western Union Telegraph Company, which the evidence shows were formerly granted in perpetuity by Georgia to Garst & Bean and to the Augusta, Atlantic & Nashville Magnetic Telegraph Company, and which are the same easements which Georgia subsequently in 1870 granted in perpetuity directly to the Western Union Telegraph Company by the contract dated August 18, 1870.

47      The decree adjudges that Georgia, by its lease of 1917, did lease to the N. C. & St. L. Ry. the easements now used by the Western Union Telegraph Company, and thereby Georgia obligated herself to remove the Western Union Telegraph Company and its lines of telegraph and to place the N. C. & St. L. Ry. in possession of those easements used by the Western Union Telegraph Company for its lines.

48      The decree adjudges that Georgia, by its said lease act of November 30, 1915, and its amendments, authorized the Western & Atlantic Railroad Commission created thereby to question and attack the title of the Western Union Telegraph Company to the easements used and occupied by it, and to remove its lines of telegraph from the right of way of the Western & Atlantic Railroad.

(b) The decree sustains the findings of the Western & Atlantic Railroad Commission that the telegraph lines of the Western Union Telegraph Company are an unlawful encroachment upon the right of way of the Western & Atlantic Railroad; sustains the finding of that Commission that the Western Union Telegraph Company has no right to maintain or operate those telegraph lines where

now located, and does not possess or own the easements necessary therefor; and sustains the finding and determination by the Commission that these telegraph lines must be removed.

These findings by the Commission, plead in the petition, are fully set out in the copy of the resolution of the Commission attached to defendant's original answer as exhibit 14.

These findings and judgments by the Commission, claimed to be pursuant to and, to be authorized by, the act of November 30, 1915, as amended, were without notice to, and without service of any process upon, the Western Union Telegraph Company advising it of, or calling upon it to be present at, any session or hearing of the Commission to pass upon these questions. Neither said act nor any amendment thereto provides for the giving of any notice to the Western Union Telegraph Company of any hearing or consideration by the Commission of any matter affecting its interest, nor does said act, or any amendment, provide for the service of any process upon the Western Union Telegraph Company to appear before said Commission, or to be present at any session of the Commission to pass upon the questions which it did pass upon in its said resolution. No provision is made in said act, or any amendment, to afford the Western Union Telegraph Company an opportunity to be heard by the Commission upon any matters affected by said resolution, or to present its claims and defenses, and to resist the claims of the present lessee made against the Western Union Telegraph Company and its properties and rights. No such opportunity was in fact afforded the Western Union Telegraph Company.

(c) This suit (as shown by the allegations and

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prayers of the petition) is not a suit to settle and determine claims of right or of title of the Western Union Telegraph Company to easements upon the right of way of the Western & Atlantic Railroad, but is really a suit by Georgia for a judgment and decree to enforce the findings of the Western & Atlantic Railroad Commission as expressed in its said resolution, and to force the Western Union Telegraph Company to remove its lines from the railroad right of way in accordance with the findings of the Commission to enable the present lessee to have and enjoy the easements, properties and rights now possessed and used by the Western Union Telegraph Company, but granted to the N. C. & St. L. Ry., by the present lease.

This is practically what the decree did. Moreover in the trial resulting in this decree such effect was given to the Georgia lease act of November 30, 1915, to the lease by Georgia, and to the action by Georgia through its Commission, that Georgia and its present lessee, who invoked the machinery of her courts to obtain a decree, were relieved of the burdens and obligations imposed upon suitors in these courts to establish by competent proof their claims, asserted rights, and plead title; were relieved of the presumptions against an ordinary suitor, and particularly of the presumption arising, upon proof of title out of a plaintiff, that the title remains out of that plaintiff until proof that he has again acquired it; and even denials by defendant of allegations of the petition were stricken on the motion of the State and its lessee.

(d) Moreover such force and effect was given to the Georgia lease act of November 30, 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western &

Atlantic Railroad Commission, as to cause the court to strike defendant's plea of laches in bar of the claims made and of the decree sought under facts alleged in that plea which would bar an individual, notwithstanding the prior Georgia act of 1856 declaring by legislative enactment that the State of Georgia in such cases would be barred. That act has remained in full force and effect from its passage in 1856 to the present time.

(e) Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that defendant's plea of title by adverse possession under plead statutes of Tennessee for the length of time therein prescribed to make the title of the possessor good was stricken, and that defense denied defendant. The denial by defendant of the allegation of the petition that Georgia owned and operated its railroad in Tennessee in a sovereign capacity, and defendant's assertion that it owned and operated its railroad in Tennessee as a private individual only, with only the rights of, and subject to the law applicable to and against, an individual, were stricken and defendant was deprived of these defenses, notwithstanding the requirements of Art. 4, Sec. 1, Par. 1, of the Constitution of the United States requiring all courts to give full faith and credit to the laws of Tennessee.

(f) Moreover, such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that, contrary to the rules of law prevailing and applicable, the action of Georgia

- through its Western & Atlantic Railroad Commission was enforced without proof that Georgia owned the land on which its right of way is situate, and without proof to establish whether it did so own that land or owned only an easement in that land for railroad purposes; and, in the latter event, without proof that the easements used by the Western Union Telegraph Company for its telegraph lines interfered with or impaired the easement of the State of Georgia in the same land for railroad purposes. The decree gave the force and
- 59 effect in this paragraph stated notwithstanding prior decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee deciding that the owner of a railroad is not the owner of the land through which its right of way is situate, but is the owner of a mere easement for railroad purposes only, the ownership of the soil and of every other use remaining in the individual land owner. These decisions of the Supreme Courts of Georgia and Tennessee were particularly called to the attention of the Supreme Court of Georgia in the petition of the Western Union Telegraph Company presented to it for a rehearing in this cause.
- 60 (g) Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that the court struck so much of the answer as plead the easements and interest in land, and the title and properties which had vested in the Western Union Telegraph Company under the laws and constitutions of Georgia under the facts and circumstances plead. Defendant was not permitted to prove these facts in evidence or to establish its plead rights, titles and claims.

(h) The decree deprives the Western Union Telegraph Company of its rights under the said Post Roads Act of Congress of July 24, 1866, and of the rights and title vested in it under that act and under grants from the State of Georgia to itself and its predecessors in title. The decree of the Supreme Court of Georgia, if not reversed by the Supreme Court of the United States, will prevent the discharge by the Western Union Telegraph Company of its obligations to the United States incurred and contracted to be performed by its acceptance of the provisions of said Post Roads Act. 62

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Supreme Court of Georgia, **or to save expense, as permitted by law, that the certified copy of the record filed with the writ of error in this cause above mentioned be taken and deemed an exhibit hereto, and to be a sufficient return to the writ of certiorari,** to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the petitioner may have such other further relief or remedy in the premises as to this Court may seem proper; and that said decrees of the Supreme Court of Georgia may be reversed by this Honorable Court. In the event this Honorable Court deems that there should be filed a certified copy of the entire transcript of the record of the case including the proceedings in the Supreme Court of 63

Georgia and printed copies thereof additional to those filed in connection with the appeal, that this Court grant an order allowing such reasonable enlargement of time as may be necessary to enable petitioner to have printed and filed in this Court such additional certified copy of the said record and proceedings in said Supreme Court of Georgia, and printed copies thereof as will enable it to comply with the rules and requirements of this Honorable Court, should it deem that your petitioner has not now sufficiently complied therewith.

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FRANCIS RAYMOND STARK,  
of New York, N. Y.

ARTHUR HEYMAN,  
of Atlanta, Ga.

WILLIAM L. CLAY,  
of Savannah, Ga.

Solicitors for the Western Union Telegraph  
Company, *Petitioner.*

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State of Georgia, }  
County of Chatham, } ss.:

Personally appeared William L. Clay, who, being duly sworn, says that in the cause herein above stated, he is, and from its inception has been, one of the counsel for the Western Union Telegraph Company, the petitioner, that he with the other counsel signing the foregoing petition prepared the



*Reasons for Allowance of Writ of Certiorari*

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same, and that the allegations thereof are true as he verily believes.

WILLIAM L. CLAY

Sworn to and subscribed  
before me, this 25 day of  
December A. D. 1923.

*Frederick I. Lantry*  
Notary Public,  
Chatham County,  
Georgia.

To the State of Georgia, as owner of the Western & Atlantic Railroad, and Nashville, Chattanooga & St. Louis Railway, as lessee operating said Railroad under the corporate name and style of Western & Atlantic Railroad, and to their solicitors, Tye, Peeples & Tye, Henry C. Peeples, and Hooper Alexander, Esquires: 68

The Western Union Telegraph Company, petitioner in the foregoing matter, will on Monday,

*January 21<sup>st</sup> 1924,* submit a petition (copy whereof is herewith served upon you) to the Supreme Court of the United States in open Court at the Capitol, Washington D. C., for a writ of certiorari to review the decision and decree of the Supreme Court of Georgia, in the cause therein stated. 69

FRANCIS RAYMOND STARK,  
ARTHUR HEYMAN,  
WILLIAM L. CLAY,

Solicitors for Petitioner.

Service of the foregoing notice, and the receipt

70      *Reasons for Allowance of Writ of Certiorari*

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of a copy of the petition therein referred to and  
brief hereto attached, is hereby acknowledged this  
26 day of *December*      A. D. 1923.

*Hooper Alexander*

Solicitor for

State of Georgia, as owner of the  
Western & Atlantic Railroad.

*Henry C. Peeples.*

71

Solicitor for

Nashville, Chattanooga & St. Louis  
Railway, as lessee operating said  
Railroad under the corporate name  
and style of Western & Atlantic  
Railroad.

TO

William R. Stansbury, Esquire,

Clerk of the Supreme Court of the United  
States, Washington, D. C.

72      The Western Union Telegraph Company, the  
above named petitioner for a writ of certiorari  
respectfully requests you to submit the foregoing  
petition to the Supreme Court of the United States  
on Monday, *January 21<sup>st</sup> 1924*,  
as permitted by the rules of that Court.

FRANCIS RAYMOND STARK,  
ARTHUR HEYMAN,  
WILLIAM L. CLAY,

Solicitors for the Western Union Telegraph  
Company.

## STATEMENT OF THE CASE AND BRIEF FOR PETITIONER.

73

### THE PETITION IN FULTON SUPERIOR COURT.

The State of Georgia in its own right, and the Nashville, Chattanooga & St. Louis Railway, as lessee of the State of Georgia of the Western & Atlantic Railroad, in their petition in this cause filed in Fulton Superior Court alleged:

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The State of Georgia in its sovereign and governmental capacity is the owner of the Western & Atlantic Railroad extending from Atlanta, Georgia, to Chattanooga, Tennessee, and all of the property pertaining thereto, including its right of way (Par. 1), and operated the same directly through its legislative and executive departments until December 27, 1870. The railroad was then leased to and has since been operated by, private corporations. The Nashville, Chattanooga & St. Louis Railway, one of the plaintiffs in the cause, is the present lessee and has since December 27, 1919, been in the possession of, and has operated, the railroad. (Par. IV and V).

75

The Western Union Telegraph Company is maintaining and operating upon and along the right of way of this railroad between Atlanta, Georgia, and Chattanooga, Tennessee, telegraph lines and doing business there with without authority from the State of Georgia, and contrary to the will and consent of its present lessee. That use constitutes an unlawful encroachment upon the right of way; is an adverse use thereof; is in derogation of the State's right and title; and operates adversely to

the rights and interest of the present lessee in the full use and enjoyment of that right of way. (Par. VI and VII.)

77

The General Assembly of Georgia by a statute approved November 30, 1915, created the Western & Atlantic Railroad Commission. That statute was amended August 4, 1916. That Commission was given full power and authority to deal with, and dispose of, any and all encroachments upon, and uses and occupancies of, any part of the right of way and properties of the Western & Atlantic Railroad, whether such use and occupancy was permissive or adverse, and whether with or without claim of right. The Commission was authorized and empowered to take such action as it might deem proper and expedient to cause the removal and discontinuance of such use or occupancy, and to this end to institute legal proceedings. (Par. VIII).

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Paragraph 14 of the present lease reserves to Georgia the right to remove, and cause to be discontinued, any and all encroachments and adverse uses and occupancies upon the right of way and property of that railroad, whether under claim of right or otherwise. To this end the present lessee has consented that the State may withhold delivery of possession or right of possession of such right of way or property as is adversely used and occupied until such encroachments, adverse uses and occupancies have been removed or discontinued. The State may, in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies acting in its own name as the owner of the property, and the present lessee will, upon request, join in such proceeding, judicial or otherwise. (Par. VIII.)

Pursuant to the direction of said statute and in accordance with the provisions of paragraph 14 of the present lease, the Western & Atlantic Railroad Commission on December 27, 1919, adopted a resolution directing its counsel to institute and prosecute in the name and behalf of the State of Georgia, "such suits and legal proceedings as may be appropriate for the removal of said encroachments and the discontinuance of such adverse use by the Western Union Telegraph Company," the present lessee to join therein. Pursuant to this resolution this suit has been brought. (Par. VIII).

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The petition invoking equity prays:

1. A decree declaring the Western Union Telegraph Company to be without lawful right or authority to use and occupy any portion of the right of way of said railroad; and commanding it to desist from such use and occupancy to the end that plaintiffs may have full and unrestricted use and enjoyment thereof free of any adverse claim by the Western Union Telegraph Company.

2. A decree enjoining the Western Union Telegraph Company and its servants from using and occupying any of the right of way of that railroad, and from interfering with the unrestricted possession and use thereof by plaintiffs.

81

## THE ANSWER.

The defendant denied that the State of Georgia owns and operates that railroad in its governmental or sovereign capacity; and alleged that, in embarking in that enterprise and in owning and operating that railroad, Georgia waived its sovereign character in respect thereto, and subjected

itself at all times to the laws and regulations applicable to, and binding upon, a private person or a private corporation, or ordinary railroad corporation owning, maintaining and operating a railroad, and assumed all of the liabilities and burdens imposed upon a private person or corporation incident to such ownership and business; and alleged that title could be acquired to such railroad properties by adverse possession, and by such action or monaction on the part of Georgia, as would give title against a private person owning a railroad; and that Georgia would be barred and estopped from disputing the claims and title of persons or corporations to portions of the right of way and properties of said railroad under circumstances under which a private person or corporation would be barred or estopped. The answer plead decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee to this effect. (Par. 1).

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The petition alleged that the State of Georgia owned "right of way" for its railroad. The answer admitted the ownership of such right of way in and through lands as is necessary for the maintenance and operation of that railroad, but expressly denied the ownership by the State of Georgia in the land itself on which this easement is situate, and asserted that the land itself and every interest and easement therein, other than a railroad easement for said railroad, belonged to the original land owner, his heirs or assigns. (Par. 1).

The answer denied ownership by the State of Georgia of the easements enjoyed by defendant and necessary for the construction, maintenance and operation of its lines of telegraph, and alleged that defendant was the owner in fee simple of those easements. (Par. 1).

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The Western Union Telegraph Company in its answer (Par. VI) alleged the following grants from the State of Georgia to its prececessors in title under which the telegraph lines now owned by it upon or along the Western & Atlantic Railroad right of way were constructed and maintained:

1. The Georgia Act of December 29, 1847, granting telegraph companies the right to construct telegraph lines upon any public road or high way.

2. A contract of October 11, 1850, between Garst & Bean and the chief Engineer of the Western & Atlantic Railroad, granting Garst & Bean the right to construct telegraph lines along the Western & Atlantic Railroad and perpetual easements thereon for the same. 86

3. The Georgia statute of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Section 6 of this act ratified the contract with Garst & Bean. Section 9 of the act granted independently perpetual easements to that telegraph company for its telegraph lines along and across any high road or high roads, "and any railroad which now or may hereafter belong to this State." At that time the State of Georgia was the owner of the Western & Atlantic Railroad. 87

The Western Union Telegraph Company in its answer deraigned its title from the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

4. The Western Union Telegraph Company further plead a contract made with it by the State of Georgia dated August 18, 1870, whereby the State of Georgia granted it a "perpetual right of way to

erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever" the Western Union Telegraph Company shall so elect.

89 The preamble of this contract recited that it was made "in order to provide necessary telegraph facilities for the party of the second part (Georgia) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto." (Par. VI.)

The answer further alleged litigation between the first lessee and the Western Union Telegraph Company in the year 1872, predicated upon this contract which was upheld by a decision of the Supreme Court of the United States in 91 U. S. 283, and thereafter the first lessee paid to the Western Union Telegraph Company the moneys claimed by it under that contract. (Par. VI.)

90 The answer further alleged that on October 22nd, 1887 (Georgia Laws 1887, page 911) the General Assembly of Georgia requested the Governor to instruct the Attorney General to examine the facts and circumstances connected with said contract and grant of August 18th, 1870, and, if ground existed for the rescinding of that contract, to institute a proceeding for that purpose. No such proceeding has ever been instituted. (Par. VI.)

The answer alleged that no ground existed for rescinding the contract, and claims that in any event the State is now barred by its laches and by



the statutes of limitations from questioning the validity of the contract, and from instituting the present suit, or any proceeding whereby or where-in the validity of that contract may be involved or questioned. (Par. VI.)

The answer further alleged that under the Georgia statute of limitation of March 6, 1856, the State of Georgia was barred of the right to have, or maintain this action. A provision of that act now embodied in Code paragraphs 4369 and 4371 is that the State will be barred when under like circumstances a private person would be barred. (Par. VI).

92

The answer further alleged that joint resolutions of the General Assembly of Georgia, December 19, 1893 (Laws of 1893 page 501) and of December 18, 1894 (Laws of 1894 page 283) recognized adverse possession of lands, rights and properties of the Western & Atlantic Railroad which would ripen into good title and bar the State from claim therein when under like circumstances a private person would be barred. These resolutions provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable," and "that any judgment or decree rendered in 'finally determining any and all matters of controversy and issues, both of law and fact between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, ways and properties,' 'shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter.'" (Par. VI).

93

The answer further alleged that the State of

Georgia did not own the Western & Atlantic Railroad, or land or right of way, or operate that railroad, in the State of Tennessee, in a sovereign or governmental capacity, but only in the capacity of a private person or of an ordinary private corporation; and that the statutes of Tennessee in respect to adverse possession, limitation of actions, and prescriptive title, plead therein, now barred the plaintiffs of having or maintaining this action. (Par. VI.)

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The answer further alleged Article 1, Section 8 of the Constitution of the United States empowered Congress to regulate interstate commerce, to establish post roads, to provide for and maintain an army and navy and to do all things necessary therefor, which would include the necessary means of rapid communication. (Par. VI).

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The answer further alleged the Post Roads Acts of Congress of A. D. 1837, 1853 and 1872, declaring all railroads to be post roads; and plead the Post Roads Act of Congress of July 24th, 1866, "to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and the acceptance thereof by the Western Union Telegraph Company in the year 1866, which, by the terms of that statute, placed upon the Western Union Telegraph Company certain burdens and gave to the government certain rights therein enumerated. (Par. VI).

The affirmative grant and obligations of that statute, coupled with the grant of perpetual easements by the State of Georgia, makes it unlawful for the State of Georgia, its lessee, or the Western Union Telegraph Company, to destroy or abandon these telegraph lines, or defeat the service which

that statute requires to be rendered to the United States, which has the right to purchase those lines when it desires as provided in the Post Roads Act. (Par. VI).

The answer admitted that the Western Union Telegraph Company and its predecessors in title have been in adverse possession of said easements along the Western & Atlantic Railroad, but denied that its use and occupancy thereof were unlawful or without right, or that the same constituted a trespass. The answer asserted that under the facts plead therein the Western Union Telegraph Company had title thereto and is entitled to peacefully have and enjoy the same, and to operate its telegraph lines thereon, without any interference from the State of Georgia, its lessee, or any other person. (Par. VI).

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The answer alleges that any interference by the Nashville, Chattanooga & St. Louis Railway with the Western Union Telegraph Company or its lines of telegraph, and any Georgia statute, law, judgment or decree permitting such interference, or requiring the removal of said lines of telegraph, "will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and constitutions of Georgia and of the United States and will be unjust and inequitable to defendant not only because of the facts above alleged, but also under and because of" the great cost of construction and of maintenance for over sixty (60) years without objection by the State of Georgia or any land owner, and because of the interest of the public and of the Government in these lines and in the service they afford. (Par. VI.)

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Exhibited to the answer is a copy of the resolutions of the Western & Atlantic Railroad Com-

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mission, under which this suit has been instituted. That resolution in effect declares the use and occupancy by the Western Union Telegraph Company to be without right and to be an unlawful encroachment; declares this suit "for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of paragraph 14 of the new lease contract dated May 11th, 1917"; and directs the institution of this suit for the removal of said encroachment and the discontinuance of said use. (Par. VIII).

101

The answer denied that the Commission has the power and authority claimed for it, and denied that the Governor and Secretary of State had the power to insert in the present lease the provision last mentioned, or to make the claims and assert the rights therein made and asserted, or to contract with respect thereto, and particularly in-so-far as the same relates to the Western Union Telegraph Company and its lines of telegraph and easements. (Par. VIII).

102

In paragraph VIII of its answer the Western Union Telegraph Company denied that the Act of November 30, 1915, or any amendment thereof, gave to the Commission certain specified powers which it understood the Commission and the petitioners claimed, including in particular the right to attack defendant's right to its telegraph lines and easements, to seek to have its title thereto annulled, to have the above grants from the State of Georgia declared ineffective, to remove or interfere with defendant's lines of telegraph, to prevent or defeat defendant's performance of obligations under, and to deprive defendant of the rights,

properties and franchises acquired by it under said act of Congress.

The unconstitutionality of the Georgia Act of 1915 and of the action of the Commission is alleged in the following language:

"Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto, has the force and effect and delegates the authority herein above denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the Commissioners, and this suit and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing, said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby:

"(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 2.

"United States Constitution Art. 1, Sec. 10, Par. 1.

"(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant which violates

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105

*Defenses Stricken*


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"Georgia Constitution, Art. 1, Sec. 3, Par. 3.

"(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held inviolate by all courts before whom they may be brought in question, which violates

"Georgia Constitution, Art. 12, Sec. 1, Par. 5.

"(d) Thereby property of defendant will have been taken without due process of law which violates

107 "Georgia Constitution, Art. 1, Sec. 1, Par. 3.

"Georgia Constitution, Art. 1, Sec. 3, Par. 1.

"United States Constitution 14th amendment."

### **Separate Pleas.**

In addition to the foregoing answer defendant filed separate pleas (1) of title by adverse possession; (2) that plaintiffs are barred by the laches of the State; (3) in respect to property in the State of Tennessee plaintiffs are barred because of the statute of limitations of that State.

108 The three affirmative pleas last mentioned were complete only by reference to allegations in the answer, and for that reason was subject to a demurrer which was interposed.

### **DEFENSES STRICKEN.**

On motion of plaintiffs the court struck all of the denials of the answer, and all matters affirmatively alleged in defendant's answer, in denial and in defense, herein above stated, except some of the allegations relating to the letter to Garst & Bean of October 11, 1850; to the act of

January 27, 1852; and a few of the muniments of title plead showing transition of title from Augusta, Atlanta & Nashville Magnetic Telegraph Company into the Western Union Telegraph Company.

Subsequently, upon the filing of an amendment to the answer, all of these allegations without exception were stricken. They are plead in the additional pleas in paragraphs XX, XXI, XXII, XXIII, XXIV of the amendment. Paragraph XX is a plea affirmatively setting up defendant's title based upon the four (4) grants from Georgia above mentioned. 110

Paragraph VIII plead a violation of the Constitutions of the United States and of Georgia and invoked the protection thereof. Grounds 39, 40 and 41 of plaintiffs motion to strike this portion of the answer claimed that the act of November 30, 1915, and its amendment, and the action of the Western & Atlantic Railroad Commission, had the force and power denied by defendant, and asserted that neither the Constitution of Georgia or of the United States were violated thereby, and that a judgment or decree granting the prayers of the petition would not be opposed to the provisions of those constitutions. 111

On motion of plaintiffs, the court struck the three affirmative pleas filed with the answer.

Leave having been given the defendant amended its answer and filed six separate affirmative pleas in paragraphs numbered XX-XXV setting up the following defenses, to wit:

Paragraph XX affirmatively plead the title in defendant. It alleged the several grants from the State of Georgia to its predecessors in title herein above mentioned, and deraigned title there-

*Defenses Stricken*

112

from into itself. In addition defendant plead the grant from Georgia under the contract of August 18, 1870, with defendant.

Paragraph XXI plead the statutes of limitation under the Georgia Act of March 6, 1856.

Paragraph XXII plead in bar prescriptive title to property in Georgia under the statutes of that State, and title by adverse possession against the State of Georgia, and against all persons whomsoever.

113 Paragraph XXIII plead in bar Tennessee statutes of limitation and of prescriptive title as to property in Tennessee.

Paragraph XXIV plead in bar facts substantially the same as those plead in its original answer and stricken, whereby the State of Georgia is barred from having or maintaining this suit because of its laches.

In each of the separate pleas in paragraphs numbered XX, XXI, XXII, XXIII and XXIV, the several grants from the State of Georgia above mentioned are plead in support of each of these several pleas.

114 Each of these pleas were stricken by the court upon plaintiff's motion.

Paragraph XXV of the amendment is a separate and distinct plea alleging that the Act of November 30, 1915, the amendment thereto, the resolution of the Commission and any judgment or decree giving that statute the force claimed in the petition or upholding and enforcing said resolution of said Commission and any judgment granting the prayers of the petition, will violate the Constitutions of Georgia and of the United States in impairing the obligations of contracts, and property will be



*Defenses Stricken*

115

taken from the Western Union Telegraph Company without due process of law in violation of the Constitution of the United States, Art. 1, Sec. 10, Par. 1, and the 14th amendment thereto. This plea is substantially as set forth in the original answer, but in addition specifies the particular contracts claimed to be impaired, to wit:

1. The Georgia Act of December 29, 1847.
2. The contract with Garst & Bean of October 11, 1850.
3. The Georgia Act of January 27, 1852.
4. The contract of August 18, 1870.

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This plea was stricken on plaintiff's motion, paragraph 59, to wit:

"59. Plaintiffs move to have stricken paragraph XXV of said amendments, because: (1) Neither the Act of November 30, 1915, nor the resolutions of the Western & Atlantic Railroad Commission, copy of which is attached to the original answer of defendant, nor any judgment or decree of this court giving to the said statute the force and effect claimed by plaintiffs in this suit, nor any judgment or decree upholding, giving the effect to or enforcing said resolution, or granting the prayers of the petition, would be violative of the Constitution of Georgia or of the United States, as claimed by defendant. (2) The same allegations were made in the original answer of defendant and were stricken therefrom, on motion of plaintiffs, by order of this court heretofore passed, still existing and unreversed."

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118 *Some Material Testimony Admitted and Excluded*

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Exceptions were duly filed to the orders striking portions of the answer, pleas and amendments thereto.

**SOME MATERIAL TESTIMONY ADMITTED AND EXCLUDED.**

119 Plaintiffs introduced in evidence the Statute of Georgia authorizing the construction of the Western & Atlantic Railroad; authorizing the acquisition by the State of Georgia of such right of way as might be necessary therefor, with authority to acquire right of way by condemnation where it could not be procured by contract. The Georgia Statutes introduced in evidence also require the officers charged with the work to act as economically as possible.

120 Hunter MacDonald a witness for the plaintiffs testified that in 1879 he entered the service of the Nashville, Chattanooga & St. Louis Railway; in 1891 he moved to Atlanta and took charge of the Western & Atlantic Railroad as resident engineer, and ever since 1892 he has been chief engineer of the N. C. & St. L. Ry.; that he had been connected with the operation of the Western & Atlantic Railroad continuously for about 40 years in one capacity or another, and that during part of that time he was in charge of its maintenance of way. He also testified that he understood that there are deeds conveying to the State of Georgia a very large part of the right of way of the Western & Atlantic Railroad; that these deeds "give right of way over, or through certain land lots;" that he found it difficult to determine the land mentioned in these right of way deeds. The witness also testified "from

*Some Material Testimony Admitted and Excluded*

121

my knowledge of such examination of deeds as I did make I am unable to say whether there are deeds conveying the right of way for the entire length of the line, or whether there are portions of the right of way to which there are no deeds, but which are possessed and held simply by possession."

In addition to the foregoing testimony which the court allowed to go to the jury, the following testimony of McDonald about these deeds was ruled out:

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"There are deeds that give right of way for the Western & Atlantic Railroad over or through certain land lots; that is nearly all give right of way through my lands in certain land lots, generally calling for a width of 33 feet on each side for railroad purposes. The general character of those deeds is that the landlord generally gives a right of way through his land for 33 feet on each side of the railroad." (Paragraph 11 of motion for new trial).

Notwithstanding the foregoing testimony plaintiffs did not offer to introduce a single deed to right of way or land to show title in the State to land or easements, or to define the character or extent of claimed interest in land.

123

The same witness, Hunter McDonald, also testified "In the year 1870, I should regard a telegraph line along the right of way of a railroad as being indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable. As soon as the applicability of

124 *Some Material Testimony Admitted and Excluded*

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a telegraph line became apparent for operating trains successfully, it was then recognized as a necessity. Prior to 1880, the telegraph line was necessary to the expeditious and safe operation of a railroad. Telegraph lines along a railroad and between stations of that railroad do give facilities to the railroad to communicate over those lines from station to station as to the movement of trains, and is of great benefit in avoiding dangers and disaster. And the use of these telegraph lines connecting those stations does greatly safeguard both life and property, and prevents many wrecks and killing of many people."

125

The report of Mitchell, Chief Engineer, to the Governor of Georgia shows the urgent necessity in the year 1850 for a telegraph line along the Western & Atlantic Railroad, and the construction of half of that line at the time the report was made at very little cost. This report further states "we expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

126

The defendant proved by Stephens that its present line of telegraph was situate and in operation where it now is from 1857 to date, and by Terrell from 1859 to date.

The court on plaintiffs motion refused to permit defendant to introduce in evidence a certified copy of the record of a suit of Enoch R. Mills against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1853 with the return of service upon the defendant in that year, and pleas filed by the defendant, verdict, judgment and execution against

*Some Material Testimony Admitted and Excluded* 127

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the defendant rendered in the year 1858; and also refused to permit defendant to introduce in evidence the record of a suit by Alfred M. Coffin against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1860 with a return of service on the defendant, and the entrance of an appearance in that cause by the defendant, and its consent to the transfer of the case to an appeal. The defendant stated that it desired to introduce in evidence the record of said two suits to prove the actual existence of the Augusta, Atlanta & Nashville Magnetic Telegraph Company from which the acceptance by it of the charter granted it by the State of Georgia by its statute of January 27, 1852, would be presumed. 128

Defendant introduced in evidence the Garst & Bean contract and the report of Engineer Mitchell, and the act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The court refused to permit the defendant to introduce in evidence deeds and proof of the transition of the title of Garst & Bean and of the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself. 129

The court refused to permit the defendant to introduce in evidence its contract with the State of August 18, 1870, by which the State granted an easement in perpetuity to the Western Union Telegraph Company. The court also refused to permit the defendant to introduce in evidence the resolutions of the General Assembly of the State of Georgia of October 22, 1887, of December 19, 1893 and of December 18, 1894 and Stephens testimony (motion for new trial par. 67) and refused to per-

130 *Some Material Testimony Admitted and Excluded*

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mit defendant to introduce in evidence the act of 1847 authorizing the construction of telegraph lines on highways.

131 The trial judge declined to give in charge to the jury any of the requests presented by defendant, including a charge that the burden of proof is on the plaintiffs; that upon the proof of outstanding title from the State to the Augusta, Atlanta & Nashville Magnetic Telegraph Company the plaintiffs cannot recover even though defendant does not connect itself with that title; that from long continued possession by defendant the law presumes a grant from its predecessors in title; that this presumption applies against the State of Georgia in this case even if, as plaintiff in this cause, or as the owner of the Western & Atlantic Railroad, it is a sovereign with only sovereign attributes.

**THE VERDICT.**

133

The judge submitted to the jury eight special issues, the answers to which constitute the verdict. The jury found:

1. (By direction of the Court) the State of Georgia is the sole and exclusive owner of the right of way of the Western & Atlantic Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, in its sovereign and governmental capacity.

2. (By direction of the Court) the Nashville, Chattanooga & St. Louis Railway is the lessee from the State of Georgia of the Western & Atlantic Railroad and its right of way, operating said railroad under the corporate name of the Western & Atlantic Railroad under lease to the Nashville, Chattanooga & St. Louis Railway dated May 11, 1917, under the Act of the General Assembly of Georgia approved November 30, 1915, and the amendments thereto.

134

3. The Western Union Telegraph Company is maintaining and operating poles and wires over, upon and along the right of way of the Western & Atlantic Railroad between Atlanta, Georgia, and Chattanooga, Tennessee.

4. The maintenance, operation and occupation by the Western Union Telegraph Company is substantially as described in paragraph 6 of the original answer of the Western Union Telegraph Company with certain specified exceptions.

135

5. The use and occupation is without authority from the State of Georgia, is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad, and constitutes an unlawful encroachment on said right of way and an adverse use thereof.

6. (By direction of the Court) this suit is in-

stituted and prosecuted in the name of the State of Georgia and in its behalf under the Act of the General Assembly of the State of Georgia of November 30, 1915, and amendments thereof, and under the provisions of said contract of lease of May 11, 1917, under by virtue of the authority and direction of the Western & Atlantic Railroad Commission, and is joined in by the Nashville, Chattanooga & St. Louis Railway as such lessee.

137 7. The Western Union Telegraph Company is occupying the right of way of the Western & Atlantic Railroad without the authority of the State of Georgia and without the consent of its lessees.

8. Twelve months from date is a reasonable time to allow the defendant for its removal of its telegraph lines from the right of way of the Western & Atlantic Railroad.

### THE DECREE.

138 Thereupon a decree was rendered which referred to the verdict and made the same the decree of the court as if set forth in the decree. The decree further found that the Western Union Telegraph Company is without lawful right or authority to use or occupy any portion of the right of way of the Western & Atlantic Railroad; commanded a cessation of such use and occupancy; and directed the removal of the telegraph lines from said right of way within twelve months from June 5, 1922. The defendant, its officers, servants and agents, were by the decree perpetually enjoined from such use and occupancy from and after twelve months from June 5, 1922, by which time defendant was commanded to remove its telegraph lines from said right of way.



A motion for new trial was made and filed. An order thereon was rendered superseding the judgment. The motion was amended, and a brief of evidence and the charge of court were filed. The motion for new trial was overruled. Exceptions pendente lite were duly signed and filed to the final decree. A direct bill of exceptions to the Supreme Court of Georgia was sued out and signed. Error was assigned upon defendant's bill of exceptions pendente lite to the judgment of the court rendered on plaintiffs' motion to strike from defendant's original answer and pleas; upon defendant's bill of exceptions pendente lite rendered upon plaintiffs' motion to strike portions of defendant's amended answer and pleas; upon defendant's bill of exceptions pendente lite to the final decree of the trial court; and upon the order and judgment of the trial court overruling defendant's motion for a new trial. 140

### **FINAL JUDGMENT OF THE SUPREME COURT.**

On September 13, 1923, the Supreme Court of Georgia rendered the following final decision in the cause, to wit: 141

"Western Union Telegraph Co. v. State of Georgia et al.

"This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, the case being for consideration by a full bench of six Justices, after consideration, (and though there is no disagreement as to many points presented for decision) three Jus-

142 *Conflicting Opinions of Justices of Supreme Court*

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tices, to wit, Russell, C. J., Hill and Gilbert, JJ., are of the opinion that the judgment of the court below should be affirmed, and three Justices, to wit, Beck, P. J., Atkinson, J., and Custer, J., (who was designated by the Governor, and presided in place of Hines, J., disqualified), are of the opinion that the judgment of the court below should be reversed, and therefore the judgment of the lower court stands affirmed by operation of law."

143 **CONFLICTING OPINIONS OF JUSTICES  
OF SUPREME COURT OF GEORGIA.**

**Opinion by Chief Justice Russell.**

Chief Justice Russell in the decision rendered by him said,

144 "I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law."

"In this action the plaintiff must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company;" but

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and *no proof was required to establish the State's ownership.*"

*Conflicting Opinions of Justices of Supreme Court  
of Georgia*

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"Therefore, upon the *reading* of the petition the plaintiff,—would have cast the burden upon the defendant to establish the the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad."

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"There was a failure on the part of the defendant in the court below,—to establish—that it was the owner of any interest whatsoever in the right of way of the Western & Atlantic Railroad, either by grant, prescription or otherwise, and—for that reason any error committed by the court during the trial was *powerless* to prevent the verdict rendered by the jury and the judgment entered thereon."

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking."

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"It is immaterial whether the ownership is in fee or only an easement."

"Even if—the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone."

148 *Conflicting Opinions of Justices of Supreme Court  
of Georgia*

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149 The opinion of Judge Russell also holds that the State of Georgia in its sovereign capacity is the owner of the Western & Atlantic Railroad both in the State of Georgia and in the State of Tennessee. After stating a reason, the decision said "and for this reason we reject the argument that the case cited from several jurisdictions to sustain the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her in the same position in regard to this enterprise as she would have occupied as an individual."

Paragraph 1 of the original answer cited Western & Atlantic Railroad vs. Carlton, 28 Ga. 180 and Schofield vs. Georgia, 54 Ga. 635, and Western & Atlantic Railroad Co. vs. Taylor, 6 Heisk. Tenn. 408 and Hutchinson vs. Western & Atlantic Railroad, 6 Heisk. 634. The last two decisions by the Supreme Court of Tennessee.

150 The reference by Chief Justice Russell to the cases cited as opposing the view entertained by him necessarily includes the four cases named plead in paragraph 1 of the original answer.

The Chief Justice said that the verdict was demanded by evidence for the reason that the case is controlled by two propositions under which the jury could not have found otherwise than it did, and for that reason the merits of all remaining assignments of error are irrelevant and immaterial. The two propositions controlling the case under the opinion of the Chief Justice are:

1. The act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company by sec-

*Conflicting Opinions of Justices of Supreme Court  
of Georgia* 151

tion 6 thereof neither ratified the contract between the State of Georgia and Garst & Bean of 1850, nor by section 9 did it grant to that corporation easements.

Section 6 of the act is expressly referred to. Section 9 appears to be referred to by the following language, "in the act of 1852—there is included—a provision that the State of Georgia is granting a definite right of way or easements which shall incumber its right of way for all time."

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Judge Russell held that the title of the act was neither broad enough to cover a provision therein ratifying the Garst & Bean contract, (section 6), or the grant of right of way (section 9), and that these sections are unconstitutional and void because of the following provision of the Georgia Constitution then in force, to wit: "Nor shall any law or ordinance be passed containing any matter different from what is expressed in the title thereof."

In holding section 6 and section 9 of the act void, Judge Russell disposed of the first proposition controlling, in his opinion, the case. 153

2. The second proposition controlling the case in the opinion of Justice Russell is that no prescriptive title ran against the State except from the time of the adoption of the Georgia Act of March 6, 1856. Under that Act the statute of limitations ran against the State of Georgia. The Georgia Code of 1861 which did not go into effect until January 1, 1863, supplanted the statute of limita-

154 *Conflicting Opinions of Justices of Supreme Court  
of Georgia*

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tions by the statute of title by adverse possession—the same creature under another name.

155 The provisions of this Code relating to title by adverse possession do not specifically apply to the State. The third paragraph of Judge Russell's decision is a finding that between 1857 and 1861 the necessary length of time had not run to bar the State and that after the Code of 1861 became operative title by adverse possession can not be acquired against the State. This decision is broad enough to apply both to land in Tennessee and in Georgia, and is an adjudication that plead statutes of limitation and of prescriptive title of the State of Tennessee are inapplicable to, and not operative against, the State of Georgia as the owner or claimant of lands in the State of Tennessee.

**Opinion by Justice Custer.**

156 The decision of Justice Custer and of Presiding Justice Beck and of Associate Justice Atkinson holds that if the contract between Mitchell, Chief Engineer of the Western & Atlantic Railroad and Garst & Bean, of October 11, 1850, "was a binding contract upon the State, then the right to use the right of way of the Western & Atlantic Railroad was conveyed and granted to the Telegraph Company.—The controlling question in passing upon the court's ruling upon the pleading in this case is whether, that contract was executed in such a way as to make it binding upon the State and the other parties thereto."

*Conflicting Opinions of Justices of Supreme Court of Georgia* 157

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After stating this contract the court said that if Mitchell had authority to make the contract an easement was thereby granted to the Telegraph Company for which Garst & Bean were acting. If Mitchell was without authority, but it "was afterwards approved and duly ratified by the General Assembly of the State—then the contract became binding upon the State."

The decision refers specifically to section 6 of the act, holds that that section does not violate the Georgia Constitution and is valid. The decision said "This section of the Act is an approval and complete ratification of the contract entered into between Mitchell and Garst & Bean, and—had the effect of granting to the Telegraph Company the franchise which permitted it to maintain and operate a telegraph line over the right of way of the Western & Atlantic Railroad." 153

This decision cited and followed the unanimous decision of a full bench of the Supreme Court of Georgia in *Goldsmith vs. Rome Railroad Company*, 62 Ga. 473, which cited and followed a number of earlier decisions of the Supreme Court of Georgia by full bench including particularly *Davis vs. Bank of Fulton*, 31 Ga. 69. The decision of Justice Custer, after citing the decision of *Goldsmith vs. Rome Railroad Company* in 62 Georgia says: "It covers and adjudicates in principle the question which we are called upon here to decide." 159

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*Petition for Rehearing*  
*Final Judgment of the Supreme Court of Georgia*  
*Denying Petition for Rehearing*

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**PETITION FOR REHEARING.**

The Western Union Telegraph Company filed its petition in the Supreme Court of Georgia for a rehearing upon grounds therein set forth.

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Before final decision the Western Union Telegraph Company filed its claim to the effect that the divided opinion of the Supreme Court of Georgia would result in changing the rule of construction of that court, which would be repugnant to the Constitution of the United States; section 6 and section 9 of the Act of January 27, 1852, being by the present judgment held unconstitutional, whereas under the unanimous unreversed decisions of the Supreme Court of Georgia previously existing those sections are, and would have been held, constitutional. The change in the rule of construction impairs the obligation of a contract contrary to the provisions of the Constitution of the United States.

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**FINAL JUDGMENT OF THE SUPREME  
 COURT OF GEORGIA DENYING PETI-  
 TION FOR REHEARING.**

On September 29, 1923, the Supreme Court of Georgia refused to grant a rehearing.



**BRIEF.**

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**I.****Impairment of Contracts.**

Petitioner claims that Georgia, by her act of November 30, 1915, and its amendments, by her lease of the W. & A. R. R. under that act, and by the action of her W. & A. R. R. Commission, has impaired contracts made by her with predecessors in title of the Western Union Telegraph Company, to wit:

- (1) A contract with Garst & Bean (Exhibit 2); 164
- (2) A contract with A. A. & N. M. T. Co. A. D. 1852 (Exhibit 3);

And has impaired

- (3) A contract made by Georgia directly with the Western Union Telegraph Company August 18, 1870 (Exhibit 4).

The final decree in this cause adjudges that the Georgia Act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry. of easements covered by the three contracts last mentioned; that Georgia by her lease of 1917 did lease those easements to the N. C. & St. L. Ry.; that the lease act of November 30, 1915, and its amendments, authorized the W. & A. R. R. Commission to question and attack the title of the Western Union Telegraph Company to the easements occupied by it under those contracts; and authorized that Commission to remove the lines of telegraph of the Western Union Telegraph Company from those easements and to cause a discontinuance thereof.

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The final decree sustains the finding of the Com-

mission that petitioner's telegraph lines are an unlawful encroachment upon the right of way of the W. & A. R. R.; that petitioner has no right to maintain and operate those lines where now located; sustains the finding and determination of the Commission that those lines must be removed. The decree requires the removal of petitioner's telegraph lines so that the easements necessary therefor may be given to, and delivered into the possession of, the N. C. & St. L. Ry. under the Georgia Act of November 30, 1915, and its amendments, and under said lease, and under the action of Georgia through her Railroad Commission.

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Two questions arise for determination by this Court.

(1) Was a lawful contract made by the State of Georgia with Garst & Bean or with the A. A. & N. M. T. Co., the predecessors in title of petitioner; and was a lawful contract made by Georgia with petitioner under the contract of August 18, 1870?

(2) Has the State of Georgia passed any law impairing the obligations of those contracts, or of either of them?

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The Justices of the Supreme Court of Georgia are evenly divided as to whether a lawful contract was made by the State of Georgia with Garst & Bean or with the A. A. & N. M. T. Co.

The validity of the contract of August 18, 1870, between Georgia and petitioner is not discussed by any of the Justices of the Supreme Court of Georgia.

The Garst & Bean contract is valid for the reason stated in ground number 3 of the petition for rehearing in the Supreme Court of Georgia.

The validity of the contract-grant by the State of Georgia to the A. A. & N. M. T. Co. of the ease-

ments now occupied by petitioner depends, in the opinion of the Supreme Court of Georgia, on the construction and effect of the provision of the then existing Georgia Constitution, to wit, "*nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof.*"

Section 6 of the act incorporating the A. A. & N. M. T. Co. ratifies the Garst & Bean contract. Three Justices held that the ratifying provision of that section is matter different from that expressed in the title of the act and is, therefore, unconstitutional. Three Justices are of exactly the opposite opinion.

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The Garst and Bean contract and section 9 of the act of 1852 each granted an assignable, irrevocable and perpetual easement.

*Ga. vs. Trustees of Cinn. Sou. Ry.* 248  
U. S. 26.

*Sheffield vs. Collier*, 3 Ga. 82, 86.  
*Georgia Code, Paragraph 3645.*

While the Justices of the Supreme Court of Georgia only deal with section 9 inferentially, it is apparent from their decisions that three of the Justices were of the opinion that section 9 of the act of 1852 was opposed to the above mentioned provision of the Georgia Constitution, while the remaining three Justices thought section 9 valid under that constitution. In grounds 2 and 3 of the petition for rehearing in the Supreme Court of Georgia, as well as in the decision rendered by Justice Custer of the Georgia Supreme Court, it is claimed that under former unanimous and unreversed decisions of the Supreme Court of Georgia

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section 6 and section 9 of the Act of 1852 are constitutional and constitute lawful grants to the A. A. & N. M. T. Co, the predecessor in title of petitioner.

The Georgia decisions there cited and relied upon are *Goldsmith vs. Rome R. R.*, 62 Ga. 473; *Davis vs. Bank of Fulton*, 31 Ga. 69; *Goldsmith vs. A. & S. R. R. Co.*, 62 Ga. 468; *Hope vs. Mayor*, 72 Ga. 246; and *Bonner vs. Milledgeville Ry. Co.*, 123 Ga. 115.

173 The Georgia law is that the foregoing decisions stand until set aside in the manner provided by law, and until then have the force and effect of a statute.

*Georgia Code par.* 6207.

*Heard vs. Russell*, 59 Ga. 25, 54.

*Lucas vs. Lucas*, 30 Ga. 191.

*Fidelity Co. vs. Nesbit*, 119 Ga. 316, 325.

174 While due deference is given by this Court to the opinions and decisions of State courts, this Court has always held that it must for itself decide, where impairment of a contract is claimed, whether in fact a contract did in the first instance exist. And this Court has never hesitated or refused to reverse a decision or judgment of a State court, holding that no contract existed when this Court reached the conclusion that there was a valid existing contract.

*Columbia Ry. G. & E. Co. vs. State of S. C.*

—U. S.— 43 S. C. Rep. 306.

*Ga. Ry. & P. Co. vs. Town of Decatur*,

—U. S.—43 S. C. 613.

*Detroit United Ry. vs. Michigan*, 242

U S. 238, 247-251.

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*Louisiana R. & N. Co. vs. New Orleans*,  
235 U. S. 164, 170-171.

*St. Paul Gas Light Co. vs. St. Paul*, 181  
U. S. 142, 147.

*Water Power vs. Street Ry. Co.*, 172  
U. S. 475, 487.

Where the act in question was held by the State Court to be void because opposed to the *State Constitution*, this Court upon reaching the opposite opinion has held the act valid under the *State Constitution* and has reversed the State Court.

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*Houston & T. C. R. R. Co. vs. Texas*, 177  
U. S. 66, 77.

See also

*Ohio Life Ins. & T. Co. vs. Debolt*, 16 How.  
416, 431, 432.

*Gelpcke vs. City of Dubuque*, 1 Wall. 175,  
205, 206.

The Georgia decisions above cited are in full accord with the decisions of this Court. *Montclair vs. Ramsdell*, 107 U. S. 147, 155, is approvingly quoted and followed in *Hope vs. Mayor*, 72 Ga. 246, 250. Of like import are *Detroit vs. Detroit Railway*, 184 U. S. 368, 391-392; *Blair vs. Chicago*, 201 U. S. 400, 451. These decisions fully support and sustain the decision of Justice Custer and the two Justices concurring with him interpreting the Georgia Constitution and the Georgia Act of 1852, and in deciding that section 6 thereof ratifying the contract with Garst & Bean and section 9 of that act independently granting easements are valid.

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The interpretation upholding the validity of sections 6 and 9 of the act of 1852 is also supported

by the practice of the various departments of Georgia by acquiescence in the construction of telegraph lines under the Garst & Bean contract and the Act of 1852, as well as under the contract of August 18, 1870, and by acquiescence in the use of easements necessary therefor, and the operation of those lines with constantly accruing benefit to the State of Georgia. Such collateral interpretation is entitled to great weight even when a statute is assailed on the ground of unconstitutionality.

*Howell vs. State*, 71 Ga. 224, 229.

*Stuart vs. Laird*, 1 Cranch 299, h.n. 3, page 309.

*U. S. vs. Philbrick*, 120 U. S. 52, 59.

*U. S. vs. Alabama G. S. R. R. Co.*, 142 U. S. 615, 621.

*U. S. vs. Johnson*, 124 U. S. 253.

*Roberts vs. Downing*, 127 U. S. 607, 613.

*U. S. vs. Hermonos*, 209 U. S. 337, 339.

*Johnson vs. Towsley*, 13 Wall. 72.

In *U. S. vs Des Moines Navigation Co.*, 142 U. S. 510, in which a grant by the United States was attacked, the court said in the last head note

“The knowledge and good faith of the legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith.”

The contract of August 18, 1870, with petitioner is not discussed in the opinions of the Justices of the Supreme Court of Georgia. The effect of the judgment of that court nevertheless is to uphold the decision of the trial court under which that

contract was impaired by the Georgia Act of 1915 and its amendments, by the Georgia lease of 1917, and by the action of the W. & A. R. R. Commission.

That contract is the basis of ground 4 of the petition for rehearing in the Supreme Court of Georgia. That contract was authorized by the Georgia act of January 15, 1852, there quoted.

There can be no doubt, and the Supreme Court of Georgia evidently concedes, that the foregoing contracts and each of them, if valid, have been impaired by Georgia as claimed by Western Union Telegraph Company.

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The impairment of the Georgia contracts with Garst & Bean, with the A. A. & N. M. T. Co., and with petitioner, were specifically plead in the answer of the Western Union Telegraph Company.

The force and effect claimed by plaintiffs for the Georgia Act of November 30, 1915, and its amendments, for the Georgia lease of 1917, and for the action of the W. & A. R. R. Commission, was stated in the petition and in the answer; and the answer alleged that, if the force and effect claimed by the plaintiffs should be given, the foregoing contracts, and each of them, would be impaired.

This Court has held that, if an act of the State Legislature is by judicial decree given a construction whereby a contract will be impaired, this Court should take jurisdiction of the case.

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*Bridge Proprietors vs. Hoboken Co.* 1  
Wall. 116, 144-145.

In *Williams vs. Bruffy*, 96 U. S. 176, this Court said on page 184 "the constitutional provision prohibiting a State from *passing* a law equally prohibits a State from *enforcing* as a law an enactment

of that character, from whatever source originating," referring to enforcement by judicial decree.

Under the decisions of this Court, the Georgia Act of November 30, 1915, the action of Georgia in making its lease of 1917 to the N. C. & St. L. Ry., and the action of Georgia through its W. & A. R. R. Commission, each come within the scope of, and are within the inhibition of Art 1, Section 10, Par. 1 of the Constitution of the United States prohibiting the State from passing a law impairing the obligation of a contract.

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*Arkadelphia Co. vs. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 141.

*Reinman vs. Little Rock*, 237 U. S. 171, 176.

*A. C. L. R. R. Co. vs. Goldsboro*, 232 U. S. 548, 555.

*Williams vs. Bruffy*, 96 U. S. 176, 183.

The silence of the Supreme Court of Georgia upon constitutional questions raised do not affect those questions or the right of appeal to this Court.

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*Corn Products Refg. Co. vs. Eddy*, 249 U. S. 427, 432.

*Dahnke-Walker Co. vs. Bondurandt* 257 U. S. 282, 289.

## II.

### Changed Rule of Construction.

Reason II for the grant of the writ is upon the ground that the final decision in this cause has changed the rule of construction existing at the



time the plead contracts were made under which those contracts were valid.

That ground for review and reversal by this Court is amply sustained by decisions of this Court holding that, where a contract was not violative of a State Constitution then existing and as then construed by the State Supreme Court, a subsequent change of decision by the State Supreme Court under which that contract would be held, or was held, violative of the State Constitution, would be a ground for review and reversal by this Court, because thereby a contract lawful when made would be impaired. Particularly was this held to be true where a construction, as in the case at bar, had been acted upon for a long period of years and contracts were made with the State upon the basis of the validity of that contract, from which the State has constantly received benefit.

*Ohio Life Ins. & T. Co. vs. Debolt*, 16 How. 416, 431-432.

*Gelpeke vs. City Dubuque*, 1 Wall. 175, 205, 206.

Of similar import are

*Havemeyer vs. Iowa Co.* 3 Wall, 294, 303.

*Muhlker vs. N. Y. & H. R. R. Co.* 197 U. S. 544.

### III.

#### Due Process of Law Denied.

Reason III for the grant of the writ is the claim that Georgia has deprived petitioner of property

without due process of law, and has denied it the equal protection of the laws.

The action of the W. & A. R. R. Commission is legislative not judicial. The act creating the Commission did not vest it with any judicial functions or processes.

191 The finding or determination of the Commission is tantamount to the finding or declaration by the legislature, or by a legislative committee. If upon any theory it can be said that the finding of this Commission was in any respect judicial, then its findings are a nullity because no provision is made for notice, or for an opportunity to be heard.

*S. F. & W. Ry. Co. vs. Mayor*, 196 Ga. 680, 683.

*Mott vs. State Board*, 148 Ga. 55, 59-60.

*Garfield vs. Goldsby*, 211 U. S. 249, 262.

*Londoner vs. Denver* 210 U. S. 373, 386.

192 The final decision of the Supreme Court of Georgia, as stated in Reason III (c), (d), (f) and (g), denied to the defendant the rules of practice and procedure constituting an essential part of due process of law provided under the decisions and under the laws of Georgia for litigants in her courts, invoked in this case by Georgia and its lessee.

Among the rules of law applicable are the following:

The burden is on the plaintiff to prove its asserted claims and title.

Georgia Code Par. 5746.

A plaintiff must recover on the strength of his own title. If he fails to prove title in himself he cannot recover.

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*Jackson vs. Scroggin*, 42 Ga. 183.

*Roberts vs. Tift*, 136 Ga. 901, h.n. 4.

Upon proof of outstanding title in some one other than the plaintiff, plaintiff cannot recover even though defendant fails to connect himself with that outstanding title.

*Roberts vs. Tift*, 136 Ga. 901, h.n. 4.

*Waters vs. Durrence*, 119 Ga. 934 h.n. 4.

*Jenkins vs. Southern Ry. Co.* 109 Ga. 35  
h.n. 3 and page 41, par. 3.

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*Willis vs. Metters*, 64 Ga. 721 h.n. 2.

*Coleman vs. Rice*, 105 Ga. 163, 164.

Defendant was denied the presumptions prevailing in its favor under the ordinary rules of law, and which constitute a part of due process of law.

Whether the State of Georgia does or does not operate its Railroad in a sovereign capacity, and whether in this suit it acts in the capacity of a sovereign or not, and even though the maxim *nul-lum tempus occurrit regi* may be applicable, nevertheless presumptions do arise against the State of Georgia; and the presumption against Georgia of a grant upon proof of long adverse use and possession arises; and the defendant is entitled to that presumption as a part of due process of law in the trial of this cause.

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*U. S. vs. Chaves*, 159 ~~U.S.~~ 452, 464.

*U. S. vs. Devereaux*, 90 Fed. 182, 187-188  
(4 C.C.A. citing the case last mentioned  
and *Fletcher vs Fuller*, 120 U. S. 534.

*U. S. vs. Burns*, 160 Fed. 627, 632.

That this presumption is an essential part of due process of law, is clear from 159 U. S. 464 and 90 Fed. 187, showing the existence of this rule of law under the Common Law and under the Roman Law.

*Twining vs. New Jersey*, 211 U. S. 78, 100-101.

*C. Q. & B. R. R. Co. vs. Chicago*, 166 U. S. 226, bot. pg. 234, page 241 near top.

- 197 In *Fletcher vs. Fuller*, 120 U. S. 534, it was held, though not as against a sovereign State, that a grant under circumstances similar to those in this case would be presumed to exist.

The universal rule is that when a government or a sovereign state enters a court invoking its processes it subjects itself to the rules of law and of trial; the rule of burden of proof; and the presumptions applicable to an ordinary suitor.

*U. S. vs. Stinson*, 197 U. S. 202, 205.

*U. S. vs. Diamond Coal Co.*, 254 Fed. 266, 268 (8 C.C.A.)

- 198 *U. S. vs. Midway Oil Co.*, 232 Fed. 619, 631.

*U. S. vs. Chandler*, 152 Fed. 25, 41 (6 C.C.A. Lurton, J.)

*Iowa vs. Carr*, 191 Fed. 257, 266 (8 C.C.A.)

*U. S. vs. Debell*, 227 Fed. 775, 779 (8 C.C.A.)

*In re Morgan's Estate*, 159 N. Y. Supp. 105, 108.

*Peoples vs. Kings Co. Co.*, 191 Pac. 1004 (h.n.8) 1005, 1007.

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*Commonwealth vs. Helm*, 173 S. W. 389, 392.

*Morris vs. State*, 87 Tenn. 725, 730.

*Shelby County vs. Rickford* 102 Tenn. 402.

The opinion of Chief Justice Russell and of the the two Justices concurring with him, sustain the verdict, and the judgment thereon, in the trial court, over defendant's objection that the plaintiffs had proved no title, in the following language:

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and *no proof was required to establish the State's ownership.*" 200

"Therefore, upon the *reading* of the petition the plaintiff,—would have cast the burden upon the defendant to establish the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad." 201

If the mere reading of the plaintiff's petition sufficed to prove plaintiffs title (the State of Georgia and an ordinary railroad corporation, its lessee) and relieved them of the necessity of introducing any evidence to prove title alleged in the petition, it results either (1) that this was because of the Georgia Act of November 30, 1915, and its amendments, the lease, and the action of the W. & A. R. R. Commission, in which event due process

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of law was lacking for the reasons elsewhere herein stated; or (2) that due process was lacking in the trial of the case in that an arbitrary presumption was allowed in favor of the plaintiffs and against the defendant, and there was imposed on defendant the burden of disproving plaintiff's title, or proving its own title, without the introduction of a particle of evidence by plaintiffs.

*Mobile J. & K. C. R. R. Co. vs. Turnip Seed*, 219 U. S. 35, 43.

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*McFarland vs. American Sugar Co.*, 241 U. S. 79, 86.

In striking defendant's plea of laches, the action of the State through its legislative enactment, through its lease, and through its Commission, and the final decree interpreting and enforcing the same, has deprived petitioner of vested rights acquired under the Georgia Act of 1856, which has been of force from that day to the present time. This is opposed to the Constitution of the United States.

*Campbell vs. Holt*, 115 U. S. 620, 623, bottom of page.

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*Pritchard vs. Norton*, 106 U. S. 124, 132.  
*French Republic vs. Saratoga*, 191 U. S. 427, 438.

See also

*Indiana vs. Milk*, 11 Fed. 389, 397.

*Pengra vs. Munez*, 29 Fed. 830, 836.

*Cohn vs. Barnes*, 5 Fed. 326 334.

*U. S. vs. M'Laughlin*, 30 Fed. 147, bot. pg. 161, 162.

*New York City vs. Pine*, 185 U. S. 93, and Georgia cases cited 101, 103.

Striking the defense of the Tennessee statutes of limitation, and giving no force and effect to Tennessee decisions plead to the effect that in Tennessee the State of Georgia was not a sovereign in respect to her railroad (Reason III (d) ), denied petitioner the protection of Art. 4, Sec. 1, Par. 1 of the Constitution of the United States requiring full faith and credit to be given the laws of Tennessee, and resulted in the taking of petitioner's property without due process of law.

For like reasons the other grounds upon which reason V is based are well founded.

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In support of reason III (d), we call attention to grounds 5, 7 and 8 of the petition for rehearing in the Supreme Court. In support of reason III (e) we call attention to ground 6 of that petition for rehearing. In support of reason III (f) we call attention to ground 9 of that petition for rehearing. We avoid repetition of what is stated in those grounds of the rehearing, and do not here cite the decisions cited therein, which are pertinent.

In adjudging that the State of Georgia in the ownership and operation of its railroad both in Georgia and in Tennessee, acts in a sovereign capacity only, the decree and the decision of the Supreme Court fails to accord the Western Union Telegraph Company the benefit of the section of the Constitution of the United States requiring full faith and credit to be given to the laws and decisions of Tennessee, and conflicts with, and departs from, the following decisions plead in paragraph 1 of its answer to wit:

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*W. & A. R. R. vs. Carlton*, 28 Ga. 180;  
*Schofield vs. Georgia*, 54 Ga. 635;

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*W. & A. R. R. Co. vs. Taylor*, 6 Heisk. 408 (Tenn);

*Hutchinson vs. W. & A. R. R. Co.*, 6 Heisk. 634 (Tenn);

conflicts with the following cases cited in ground 6 of petition for rehearing in the Supreme Court of Georgia and cited in our original brief in that court, to wit:

*Morris vs. State*, 87 Tenn. 726;

*Shelby Co. vs. Rickford*, 102 Tenn. 402;

209      *Tappan vs W. & A. R. R. Co.*, 3 Lea. 106 Tenn.;

and conflicts with *Morrison vs. Cook*, 146 Ga. 570, 577, cited in amendment to said petition for rehearing.

Said decree and the decision of the Supreme Court of Georgia on this point are in conflict with the decision of this and other courts to wit:

*U. S. vs. Planters Bank*, 9 Wheat. 904, 907-8.

*South Carolina vs. U. S.*, 199 U. S. 437, h.n. 8 and pgs. 461-3.

210      *Villas vs. City of Manila*, 220 U. S. 345, 356.

*Los Angeles vs. Los Angeles Gas Co.*, 251 U. S. 32.

*U. S. vs. Strang*, 254 U. S. 491.

*Sallos vs. U. S.*, 234 Fed. 842 (2 C.C.A.)

*Panama R. R. vs. Curran*, 256 Fed. 768, 772 (5 C.C.A.)

*Davis vs. Gray*, 16 Wall. 203, 232.

*State Bank vs. Knop*, 16 How. 369, 382.

*Hall vs. Wisconsin*, 103 U. S. 5, 11.

*French Republic vs. Saratoga*, 191 U. S. 427.



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*Cook vs. U. S.*, 91 U. S. 389, 398.

The points made in Reason III (c), (d), (e), (f) and (g) are not grounds for review by this Court where due process of law has been applied in the State Court, even though this Court should differ with the conclusion of the State Court. That is not the case made under Reason III (c), (d), (e), (f) and (g). The case there made is that due process of law has been denied the petitioner in the trial of the cause, because the final decision in the cause, supporting the trial court, has given the act of November 30, 1915, and its amendments, and the action of Georgia in making her lease of 1917, and her action through her Commission, such force and effect that thereby due process of law in the respects mentioned has been denied petitioner. The effect of the decision also is that the due processes of law applicable to an individual in Georgia Courts are not applicable in this cause against the State of Georgia, or its lessee, and do not operate in favor of the Western Union Telegraph Company. If that is true, no machinery is provided by Georgia law for the guidance or control of its judiciary when the sovereign State is before it as a party litigant.

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If the decree enforces action by the State detrimental to the Western Union Telegraph Company, enforces a lease by Georgia to another of easements or properties of the Western Union Telegraph Company, or commands delivery thereof by the Western Union Telegraph Company to another, as the culmination of a trial devoid of due process of law in the respects claimed, the decree is void.

If the decree rendered commanding the removal of lines of telegraph of the Western Union Tele-

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graph Company, and commanding the surrender by it of its easements, rights and properties to the present lessee, does so merely because of the State's action through her legislative statute, through her lease, or through her Commission, it is void, because that act, that lease, and that action of the Commission, has taken property without due process of law.

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The Western Union Telegraph Company plead, and sought to prove, facts and muniments of title showing the transition of the title of Garst & Bean and of the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself. Practically all of this was stricken and excluded by the trial Judge as irrelevant upon the theory that there was in fact no valid grant to either Garst & Bean or to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The decision of Justice Russell does not touch upon the sufficiency of the facts and muniments of title plead or offered in evidence to show the transition of these grants to the Western Union Telegraph Company. That is not questioned by Judge Russell's decision.

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Judge Custer's decision on this point is

"The facts and circumstances pleaded should have been left for the consideration of the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question of title, the jury would have been authorized to find against the State; especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in

title has for nearly three quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record."

Under those facts transition of title is presumed.

*Fletcher vs. Fuller*, 120 U. S. 534.

*Wilson vs. Snow*, 228 U. S. 217, 220.

*Johnson vs. Jarvis*, 223 Fed. 756, 757-8 (4 C.C.A.). 218

*Sweeney vs. Sweeney*, 119 Ga. 76 h. n. 1 (c).

*Terry vs. Rodahan*, 79 Ga. 278.

*McCleskey vs. Leadbetter*, 1 Ga. 551, 557.

*Smith vs. McIntire*, 83 Fed. 456, 467.

*Houston Co. vs. Drumwright*, 162 S. W. 1011, 1014.

*Daugherty vs. Welshans*, 81 Fed. 1001, -2.

*Brewer vs. Cochran*, 99 S. W. 1033, 1036.

*Anderson vs. Cole*, 36 S. W. 395, 396.

The facts plead and the evidence introduced and sought to be introduced, clearly show the passage into the Western Union Telegraph Company of title originating in grants from the State of Georgia.

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Respectfully submitted,

FRANCIS RAYMOND STARK,

ARTHUR HEYMAN,

WILLIAM L. CLAY,

Attorneys for Western Union Telegraph Co  
Petitioner.

**EXHIBIT 1.**

**An Act to authorize the construction of the Magnetic Telegraph and providing for the protection of the same.—Approved Dec. 29, 1847. Pam. 218.**

Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires.

221 1. Sec. 1. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for Telegraphic purposes, on or by the side of any public road or highway in this State: Provided, that such posts, wires or fixtures shall in no case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways.

**EXHIBIT 2.**

222 **Report of Chief Engineer W. & A. R. R. to Governor of Georgia.**

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of stockholders and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, expressing a desire, at the same time of procuring the aid and countenance of the Western & Atlantic Railroad of the State of Georgia. The Company is called the Augusta, Atlanta and Nash-

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ville Telegraph Company. Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and the Telegraph Company.

Chief Engineer's Office, W. & A. R. R.  
 Atlanta, Oct. 11, 1850.

Gentlemen:

I have given much reflection to the subject of your note of yesterday, and I have had full and free conversation with His Excellency George W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition:

1. To furnish and erect the posts from Atlanta to Chattanooga, which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

2. To grant you the use of our right of way for the telegraph company, and to pass your officers and materials along the road free of charge.

3. For and in consideration of the foregoing, the Western & Atlantic R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between

*Exhibit 2*

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Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully,

N. L. MITCHELL,  
Chief Engineer.

227      MR. DAVID W. GARST,  
            and  
            MR. JAMES M. BEAN,  
            Atlanta, Ga.

Atlanta, Oct. 11, 1850.

Sir: We hereby accept the proposition submitted in yours of this date.

Yours respectfully,  
D. W. GARST,  
J. M. BEAN.

W. L. Mitchell, Esq.,  
Chief Engineer & c.,  
Atlanta, Ga.

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Whereupon I passed an order, that so soon as the telegraph company is sufficiently organized to warrant the undertaking, the Resident Engineer and Road Master make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economize as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are

planted, and the wire stretched beyond Kingston. Telegraph offices have been established at Atlanta, Marietta, Cartersville and Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

Our out-lay of money for this job has been but little beyond the cost of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful. 230

### EXHIBIT 3.

#### **An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company. Approved, January 27, 1852.**

1. Sec. I. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That James M. Bean, John H. Glover, and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who may have acquired from Samuel F. B. Morse the right to construct and carry on the Electro-Magnetic Telegraph, by him invented and patented, through this State and other States, on the route leading from the City of Augusta, through Atlanta, to the city of Nashville, in the State of Tennessee, be and they are hereby made and declared a body politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said Telegraph, on the route afore- 231

said, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta, and Nashville Magnetic Telegraph Company.

3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having acquired the right to do so from the owners of Morse's Patent, and may enlarge its capital for that purpose.

233 6. Sec. VI. And be it further enacted, That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and D. W. Garst and J. M. Bean, on the part of said Company be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent Stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said Railroad, or other officer having the chief control of said Road  
234 for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract.

8. Sec. VIII. That the said Corporation shall have power and authority to contract with any person or persons, or bodies corporate, for the purpose of connecting its lines of Telegraph with lines out of the State.

9. Sec. IX. That the Augusta, Atlanta, and Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any



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railroad which now or may hereafter belong to this State, and any waters or water courses of this State, without the same being held or deemed a public nuisance, or subject to be abated by any private person; provided, The said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owner, further than is unavoidable.—

#### **EXHIBIT 4.**

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#### **Georgia statutes making laches operate against Georgia.**

Georgia Code of 1910.

"No. 4369. Limitations in equity. The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce their legal rights."

"No. 4371. Limitations to operate against the State. When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

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#### **EXHIBIT 5.**

#### **Resolution of W. & A. R. R. Commission directing institution of this suit.**

WHEREAS, the Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, under the lease beginning December 27, 1919, has represented to this Commission that the West-

ern Union Telegraph Company is adversely using and occupying the right of way of said railroad by telegraph lines, poles, wires and other appurtenances without authority therefor from the State of Georgia, and against the consent of the Nashville, Chattanooga & St. Louis Railway:

AND WHEREAS, the said Nashville, Chattanooga & St. Louis Railway has requested this Commission to take appropriate action for the removal of this encroachment and the discontinuance of this adverse use in pursuance of the Act creating this  
239 Commission as amended August 4, 1916, and of Paragraph 14 of the new lease contract:

AND WHEREAS, the Counsel for this Commission has reported that the adverse use and occupancy of said right of way by the Western Union Telegraph Company is without lawful authority from the State of Georgia; and that the institution of appropriate proceedings for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of Paragraph 14 of the new lease contract dated May 11th, 1917:

240 NOW, THEREFORE, BE IT RESOLVED, That William A. Wimbish, Counsel for this Commission, be, and he is hereby, authorized and directed to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment and the discontinuance of said use: Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State.